No. 91-1326

In The
Supreme Court of the United States
October Term, 1991

THE DISTRICT OF COLUMBIA AND SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief of Amicus Curiae, State of Oklahoma Ex Rel Dave Renfro, Commissioner of Labor, Administrator of the Workers' Compensation Court and the Attorney General

In Support of Petitioners:

SUSAN B. LOVING,
Attorney General
RABINDRANATH RAMANA,
Asst. Attorney General
MICHAEL M. SYKES,
General Counsel,
Department of Labor
* KAYLA A. BOWER,
Asst. Counsel,
Department of Labor and
for Marcia Davis
Administrator, Workers'
Compensation Court

Counsel for Amicus Curiae
4001 Lincoln Bouelvard
Oklahoma City, OK 73105
Telephone: (405) 528-1500

* Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

OTHER AUTHORITIES

No. 91-1326

In The
Supreme Court of the United States
October Term, 1991

THE DISTRICT OF COLUMBIA AND SHARON PRATT KELLY, MAYOR,
Petitioners,

v.

THE GREATER WASHINGTON BOARD OF TRADE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

Brief of Amicus Curiae, State of Oklahoma Ex Rel Dave Renfro, Commissioner of Labor, Administrator of the Workers' Compensation Court and the Attorney General

INTEREST OF AMICUS CURIAE

The State of Oklahoma, through its primary enforcement agencies in the workers' compensation arena, is concerned that the opinion rendered by the District of Columbia Circuit provides encouragement for promoters to hide behind perceived ERISA preemption to avoid traditional responsibilities in the workers' compensation area. Oklahoma's concerns are not unlike those of most states with similar compulsory laws and insurance requirements. (See 1991 Analysis of Workers' Compensation Laws, prepared and published by the U.S. Chamber of Commerce, APPENDIX)

The Oklahoma Commissioner of Labor is responsible for enforcing workers' compensation insurance requirements. The Commissioner of Labor is concerned about leasing companies and other employers which devise an unregulated "ERISA screen" to avoid the requirement to carry approved workers' compensation insurance. The Commissioner fears an overbroad opinion such as the one

rendered by the District of Columbia Circuit appears to sanction employers removing themselves from the workers' compensation system and its requirements. The Commissioner of Labor has recently been required to cite employers for failing to carry insurance. The Commissioner faces threats to remove workers' compensation cases from the Oklahoma court system to federal court because of an "ERISA" plan and dicta contained in Circuit opinions now under review by this Court.

The Administrator of the Workers' Compensation Court is responsible for approving self-insurance, either group or individual, for employers who may elect this as an alternative to an insurer approved by the Insurance Commission. The Administrator faces the prospect of these employers no longer maintaining authorized insurance if they are allowed to remove themselves from the workers' compensation system by hiding behind "ERISA."

The State, through the Attorney General and various District Attorneys, enforces its requirements with both civil and criminal penalties.

SUMMARY OF ARGUMENT

While ERISA preemption is expansive, state laws such as disability insurance and workers' compensation, are not preempted. This Court should overrule the District of Columbia Circuit opinion under review because it is at odds with Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983). The Second Circuit correctly applied Shaw in R.R. Donnelley & Sons Company v. Prevost, 915 F.2d 787 (2d Cir. 1990), cert. denied, 111 S.Ct. 1415 (1991).

Blurring of lines protecting state disability and workers' compensation laws from preemption by ERISA unnecessarily encourages opportunistic promoters to profit from stonewalling state enforcement efforts. The misapplication of Shaw by the Circuit Court has contributed to increasing numbers of Oklahoma employers, particularly company leasing formats, who are refusing to comply

with mandatory insurance requirements for paying workers' compensation claims. Oklahoma is entitled to enforce its workers' compensation laws in the court established for that purpose.

ARGUMENT

THE DECISION BELOW IS IN CONFLICT WITH SHAW AND THREATENS THE ENFORCEMENT OF OKLAHOMA'S WORKERS' COMPENSATION LAWS.

The State of Oklahoma may maintain a workers' compensation system without fear it will be destroyed by ERISA. In Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 108 (1983), this Court unanimously concluded, "Congress surely did not intend, at the same time it preserved the role of state disability laws, to make enforcement of those laws impossible." First, this Court made clear that "the State may not require an employer to alter its ERISA plan." However, "[i]f the State is not satisfied that the ERISA plan comports with the requirements of its disability insurance law, it may compel the employer to maintain a separate plan that does comply." Id.

The Second Circuit's opinion in R.R. Donnelley & Sons Co. v. Prevost, 915 F.2d 787, 793 (2d Cir. 1990) clearly applies the Shaw principle of freely allowing the states to enforce those areas of insurance law retained to them.

The District of Columbia Circuit's opinion in Greater Washington Board of Trade v. District of Columbia, 948 F.2d 1317, 1326 (D.C. Cir. 1991), blurs the meaning of "relate to."

Broad language to preempt the District of Columbia law was the Circuit Court's reaction to its suspicions that "appellees have now tried to regulate indirectly what they were forbidden to regulate directly." 948 F.2d at 1326. Broad language by the Circuit has given rise in Oklahoma to promoters pushing plans as a way to avoid the state's ordinary enforcement of its workers' compensation laws. This Court's affirmance of the District of Columbia Circuit opinion would further encourage promoters and force the State of Oklahoma to

devote considerable time and resources to protracted litigation to preserve its workers' compensation system.

Nothing suggests that Congress sought to erode the states' dominance of their workers' compensation systems. When ERISA was passed in 1974, the Conference Committee favored preemption but explained that,

> (However, following title I generally, preemption will not apply to government plans, church plans . . . work[ers'] compensation plans, non-U.S. plans primarily for nonresident aliens, and so called 'excess benefit plans.')

H.R. CONF. REP. NO. 1280, 93rd Cong., 2d Sess. 383 (1974)

There is a strong congressional policy that workers' compensation cases "have little real business in a federal court." Kay v. Home Indemnity Company, 337 F.2d 898, 901 (5th Cir. 1964). The federal statutes prohibit the removal of all workers' compensation cases. Title 28, U.S.C. §1445(c); Olivarez v. Utica Mutual Insurance Company, 710 F.Supp. 642, 643 (N.D. Tex. 1989). Another Texas district court concluded that, "Clearly this provision [29 U.S.C. §1003(b)(3)] is intended to exempt state worker's compensation plans generally from preemption by ERISA." Foust v. City Insurance Company, 704 F.Supp. 752, 753 (W.D. Tex. 1989).

Oklahoma established a mandatory requirement for insurance, whether through an authorized insurer or approved self-insurance, either group or individual. Title 85, Okla. Stat. §61. The Oklahoma Legislature established requirements for policies of insurance. Title 85, Okla. Stat. § 64. The Legislature also established an Individual Self-Insured Guaranty Fund, Title 85, Okla. Stat. §66.1, and a Group Self-Insurance Guaranty Fund, Title 85, Okla. Stat. §66.2.

An employer who fails to secure workers' compensation insurance, either through an authorized insurer or approved self-insurance, is liable for a civil penalty enforced by the Commissioner of Labor. Title 85, Okla. Stat. §63.1-63.2. An employer who willfully fails to provide compensation may be charged with criminal penalties. Title 85, Okla. Stat. §63.3.

This Court in Shaw did not prevent Oklahoma, or any other state, from accepting an ERISA plan if it complies with Oklahoma's statutory insurance requirements. But Shaw left Oklahoma free to reject an ERISA plan if it did not comport with Oklahoma's requirements for insurance compensation for workers.

II. THIS COURT SHOULD AVOID BROAD LANGUAGE WHICH ENCOURAGES PROMOTERS TO EVADE STATE INSURANCE REQUIREMENTS BY HIDING BEHIND ERISA.

This Court should reverse the District of Columbia Circuit and avoid contributing to the use of ERISA as a means to subject the States to further abuses by promoters and sharp operators who would rely on overly broad language interpreting ERISA. The states, including Oklahoma, are beset with promoters who seek to take advantage of regulatory confusion. The Senate Permanent Subcommittee on Investigations has an on-going investigation documenting these issues which plague the states.

On May 15, 1990, the Senate Permanent Subcommittee on Investigations held the first in a series of public hearings to examine the ability of the nation's current regulatory system to combat fraud and abuse in the insurance industry. Subsequent hearings were held on April 24, June 26 and July 19, 1991. The hearings examined a number of potential vulnerabilities in the insurance regulatory system which were ripe for abuse and marketed on a national scale with little or no regulation. Although the Subcommittee is continuing its investigation of insurance fraud and abuse, it issued an interim report setting forth its findings and recommendations.

The Subcommittee noted that despite amendments to clarify

ERISA preemption provisions, states continue to complain that fraudulent promoters still attempt to wrap themselves in the mantle of an employee benefit plan, enabling them to escape state regulatory efforts. Permanent Subcommittee on Investigations, Committee on Governmental Affairs United States Senate, "Interim Report on Combatting Fraud and Abuse in Employer Sponsored Health Benefit Plans," Report 102-262 (1992), p. 7. The Subcommittee concluded that ERISA has become a "tactical nuclear weapon" used by fraudulent promoters "against the threat of state regulation." Id. at 9. For example, alleged union sponsored plans and employee leasing operations provide opportunities for promoters to exploit workers and the system. Id. at 14-15, 19. James Long, North Carolina Commissioner of Insurance, described operational structures which were a "subterfuge to try to hide in the language of ERISA and avoid state regulation." Hearing before the Permanent Subcommittee on Investigations of the Committee on Governmental Affairs United States Senate, May 15, 1990, S. Hrg. 101-799, p. 98. The Subcommittee said in its conclusion,

> For almost 18 years now, comen, crooks, and hucksters have been able to take advantage of a continuing regulatory vacuum (be it actual or perceived) in the area of self-insured employer sponsored health benefit programs to fleece unsuspecting employers and their employees of hard-earned dollars. They have built their lavish lifestyles on the shattered lives of innocent men, women and children while regulators have argued with one another over who has jurisdiction and whether the problem already has been solved. Interim Report at 17-18.

Jo Ann Howard, Texas Board of Insurance member, warned that "new schemes are multiplying right now like cancerous cells." Hearing at 9. Tom Gallagher, Florida Insurance Commissioner, testified that his state is "home to virtually every benefit alternative now being explored." Id. at 11. Senator Roth concluded, "When there is that much money involved, it should come as no surprise that slick operators have developed schemes which prey upon the unsuspecting

and leave victims scarred for life." Id. at 15. Ms. Howard lamented, "The States lose, the participants lose, the legitimate insurance companies lose. The only people who come out ahead in this are the swindlers and the crooks. . . ." Id. at 26.

As a result of the Circuit's retreat from Shaw, the State of Oklahoma has experienced an increasing number of citations issued as a result of promoters using an unregulated ERISA plan to avoid purchase of approved insurance as required by Oklahoma's workers' compensation laws.

CONCLUSION

This Court should overrule the District of Columbia Circuit and reinforce the principles of Shaw so that the states, including Oklahoma, will be free to enforce their workers' compensation system free of protracted litigation in federal court.

Respectfully submitted,

SUSAN LOVING,
Attorney General

RABINDRANATH RAMANA,
Asst. Attorney General

MICHAEL M. SYKES,
General Counsel
Department of Labor

---

* KAYLA A. BOWER,
Asst. Counsel
Department of Labor and
for Marcia Davis,
Administrator
Workers' Compensation
Court

Counsel for Amicus Curiae
4001 Lincoln Boulevard
Oklahoma City, OK 73105
Telephone: (405) 528-1500

* Counsel of Record

Proof of Service

I hereby certify that on this 5th day of June, 1992, a true and correct copy of the foregoing Brief of Amicus Curiae was mailed to:

Donna M. Murasky
Assistant Corporation Counsel
District Building
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Counsel for Petitioners

Lawrence P. Postol
Seyfarth, Shaw, Fairweather & Geraldson
815 Connecticut Ave., N.W.
Washington, D.C. 20006-7004
Counsel for Respondent

Kayla A. Bower

APPENDIX

1991
Analysis of

WORKERS' COMPENSATION LAWS

Prepared and Published by
the U.S. Chamber of Commerce

CHART I **TYPE OF LAW AND INSURANCE REQUIREMENTS** **January 1, 1991**

JURISDICTION	TYPE OF LAW	INSURANCE	SELF INSURANCE	PENALTIES ON FAILURE TO INSURE
ALABAMA	Compulsory	Required	Individual and group	[illegible]
ALASKA	Compulsory	Required	Permitted	[illegible]
AMERICAN SAMOA	Compulsory	Required	Permitted	[illegible]
ARIZONA	Compulsory	Required	Individual and group	[illegible]
ARKANSAS	Compulsory	Required	Individual and group	[illegible]
CALIFORNIA	Compulsory	Required	Permitted	[illegible]
COLORADO	Compulsory	Required	Individual and group	[illegible]
CONNECTICUT	Compulsory	Required	Permitted	[illegible]
DELAWARE	Compulsory	Required	Individual and group	[illegible]
DISTRICT OF COLUMBIA	Compulsory	Required	Permitted	[illegible]
FLORIDA	Compulsory	Required	Individual and group	[illegible]
GEORGIA	Compulsory	Required	Individual and group	[illegible]
GUAM	Compulsory	Required	Not permitted	[illegible]
HAWAII	Compulsory	Required	Individual and group	[illegible]
IDAHO	Compulsory	Required	Permitted	[illegible]
ILLINOIS	Compulsory	Required	Individual and group	[illegible]
INDIANA	Compulsory	Required	Permitted	[illegible]
IOWA	Compulsory	Required	Individual and group	[illegible]
KANSAS	Compulsory	Required	Individual and group	[illegible]
KENTUCKY	Compulsory	Required	Individual and group	[illegible]
LOUISIANA	Compulsory	Required	Individual and group	[illegible]
MAINE	Compulsory	Required	Individual and group	[illegible]
MARYLAND	Compulsory	Required	Individual and group	[illegible]
MASSACHUSETTS	Compulsory	Required	Individual and group	[illegible]
MICHIGAN	Compulsory	Required	Individual and group	[illegible]
MINNESOTA	Compulsory	Required	Individual and group	[illegible]
MISSISSIPPI	Compulsory	Required	Individual and group	[illegible]
MISSOURI	Compulsory	Required	Individual and group	[illegible]
MONTANA	Compulsory	Required	Individual and group	[illegible]
NEBRASKA	Compulsory	Required	Permitted	[illegible]
NEVADA	Compulsory	Required in state fund	Individual	[illegible]
NEW HAMPSHIRE	Compulsory	Required	Individual and group	[illegible]
NEW JERSEY	Elective	Required	Permitted	[illegible]
NEW MEXICO	Compulsory	Required	Individual and group	[illegible]
NEW YORK	Compulsory	Required	Individual and group	[illegible]

[illegible footnotes]

CHART I ☐ TYPE OF LAW AND INSURANCE REQUIREMENTS ☐ January 1, 1991 (continued)

JURISDICTION	TYPE OF LAW	INSURANCE	SELF-INSURANCE	PENALTIES ON FAILURE TO INSURE
NORTH CAROLINA	Compulsory	Required	Individual and group*	[illegible]
NORTH DAKOTA	Compulsory	Required in state fund	Not permitted	[illegible]
OHIO	Compulsory	Required in state fund	Permitted	[illegible]
OKLAHOMA	Compulsory	Required	Individual and group	[illegible]
OREGON	Compulsory	Required	Individual and group	[illegible]
PENNSYLVANIA	Compulsory	Required	Permitted	[illegible]
PUERTO RICO	Compulsory	Required in territorial fund	Not permitted	[illegible]
RHODE ISLAND	Compulsory	Required	Individual and group	[illegible]
SOUTH CAROLINA	Elective	Required*	Individual and group	[illegible]
SOUTH DAKOTA	Compulsory	Required	Individual and group	[illegible]
TENNESSEE	Compulsory	Required	Individual and group	[illegible]
TEXAS	Elective	Required*	Not permitted**	[illegible]
UTAH	Compulsory	Required	Permitted	[illegible]
VERMONT	Compulsory	Required	Permitted	[illegible]
VIRGIN ISLANDS	Compulsory	Required in territorial fund	Not permitted	[illegible]
VIRGINIA	Compulsory	Required	Individual and group	[illegible]
WASHINGTON	Compulsory	Required in state fund	Permitted*	[illegible]
WEST VIRGINIA	Compulsory	Required in state fund	Permitted	[illegible]
WISCONSIN	Compulsory	Required	Permitted	[illegible]
WYOMING	Compulsory	Required in state fund*	Not permitted	[illegible]
F.E.C.A.	Compulsory	Federal appropriation		
LONGSHORE ACT	Compulsory	Required	Individual and group	[illegible]
ALBERTA	Compulsory	Required in provincial fund	Not permitted	[illegible]
BRITISH COLUMBIA	Compulsory	Required in provincial fund*	Not permitted	[illegible]
MANITOBA	Compulsory	Required in provincial fund	Not permitted	[illegible]
NEW BRUNSWICK	Compulsory	Required in provincial fund*	Not permitted	[illegible]
NEWFOUNDLAND	Compulsory	Required in provincial fund	Not permitted	[illegible]
NORTHWEST TERRITORIES	Compulsory	Required in territorial fund	Not permitted	[illegible]
NOVA SCOTIA	Compulsory	Required in provincial fund	Not permitted	[illegible]
ONTARIO	Compulsory	Required in provincial fund	Not permitted	[illegible]
PRINCE EDWARD ISLAND	Compulsory	Required in provincial fund	Not permitted	[illegible]
QUEBEC	Compulsory	Required in provincial fund	Not permitted	[illegible]
SASKATCHEWAN	Compulsory	Required in provincial fund	Not permitted	[illegible]
YUKON TERRITORY	Compulsory	Required in territorial fund	Not permitted	[illegible]
CANADIAN MERCHANT SEAMEN'S ACT	Compulsory	Required	At discretion of Board	[illegible]

N.C. [illegible]

S.C. [illegible]

Texas: [illegible]

Wash.: [illegible]

Wyo.: [illegible]

B.C. [illegible]

N.B. [illegible]